

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MARK FOREMAN, GEORGE MAZE, ROYCELLUS
SMITH, JOHN MAZE and STEVEN A. LONG,

Plaintiffs,

v.

CLEAR CHANNEL OUTDOOR, INC.,

Defendant.

No. C 10-03853 CW

ORDER DENYING
DEFENDANT'S
MOTION TO DISMISS
(Docket No. 27)

In their second amended complaint (2AC), Plaintiffs Mark Foreman, George Maze, Roycellus Smith, John Maze and Steven A. Long bring claims for unlawful discrimination based on race and wrongful termination against Defendant Clear Channel Outdoor, Inc. Defendant moves to dismiss Plaintiffs' 2AC. Plaintiffs oppose the motion. The motion was taken under submission on the papers. Having considered the papers submitted by the parties, the Court DENIES Defendant's motion.

BACKGROUND

Plaintiffs, who are African-American, are former employees of Defendant. They plead that they performed their jobs competently

1 at all times relevant to this action.

2 They allege that Servando Partita,¹ their supervisor at the
3 time of their discharge, had the goal "to replace all of the
4 African American employees in his department with Hispanic and/or
5 non-African American employees." 2AC ¶ 15. In particular, they
6 allege that Partita (1) imposed "different and more onerous
7 policies and procedures" on African-American employees; (2) did not
8 permit African-American employees "to take defendants' trucks home
9 at the end of the day," even though he allowed Hispanic employees
10 to do so; and (3) conducted "surreptitious surveillance" on
11 African-American employees "to secure any colorable reason to
12 terminate their employment so that he could replace them with
13 Hispanic and/or non-African American employees," but did not
14 conduct such observations of Hispanic employees. Id. ¶¶ 15-17.
15 Plaintiffs claim that Partita terminated their employment based on
16 his surveillance, which they allege to be "race-based." Id. ¶ 18.

17 Plaintiffs aver that the proffered reason for their discharge
18 was that they took breaks that violated Defendant's policies and
19 procedures. They allege, however, that their breaks were "not a
20 violation of defendants' policies and procedures" and that their
21 previous supervisor had approved of their breaks. Id. ¶ 19. They
22 also aver that other non-African American employees took breaks
23 similar to theirs, but that they were not "surreptitiously
24 monitored." Id. Plaintiffs plead that, after they were

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26 ¹ In their 2AC, Plaintiffs alternate between the spelling
27 "Partita" and "Partida." For the purposes of consistency, the
28 Court adopts the first spelling.

1 discharged, Partita replaced them with "Hispanic and/or non-African
2 American employees." Id. ¶ 20.

3 On December 7, 2010, the Court granted Defendant's motion to
4 dismiss Plaintiffs' first amended complaint and afforded them leave
5 to amend their claims for race discrimination, in violation of
6 California's Fair Employment and Housing Act (FEHA); and wrongful
7 termination.

8 LEGAL STANDARD

9 A complaint must contain a "short and plain statement of the
10 claim showing that the pleader is entitled to relief." Fed. R.
11 Civ. P. 8(a). Dismissal under Rule 12(b)(6) for failure to state a
12 claim is appropriate only when the complaint does not give the
13 defendant fair notice of a legally cognizable claim and the grounds
14 on which it rests. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555
15 (2007). In considering whether the complaint is sufficient to
16 state a claim, the court will take all material allegations as true
17 and construe them in the light most favorable to the plaintiff. NL
18 Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986).

19 However, this principle is inapplicable to legal conclusions;
20 "threadbare recitals of the elements of a cause of action,
21 supported by mere conclusory statements," are not taken as true.
22 Ashcroft v. Iqbal, ___ U.S. ___, 129 S. Ct. 1937, 1949-50 (2009)
23 (citing Twombly, 550 U.S. at 555).

24 DISCUSSION

25 I. Race Discrimination

26 To state a claim for discrimination under FEHA, a plaintiff
27 must allege: "(1) he was a member of a protected class,
28

1 (2) he . . . was performing competently in the position he held,
2 (3) he suffered an adverse employment action, such as termination,
3 . . . and (4) some other circumstance suggests discriminatory
4 motive." Guz v. Bechtel Nat'l Inc., 24 Cal. 4th 317, 355 (2000)
5 (citation omitted).

6 First, Defendant argues that Plaintiffs fail to state their
7 discrimination claim because they do not plead specific facts to
8 support their allegation that they performed their jobs
9 competently. However, Defendant does not identify any authority
10 requiring Plaintiffs to plead with such specificity. This factual
11 allegation must be taken as true and is sufficient to support
12 Plaintiffs' claim. Accordingly, this does not constitute a ground
13 for dismissal.

14 Second, Defendant asserts that Plaintiffs have failed to plead
15 facts to suggest a discriminatory motive. Plaintiffs allege that
16 Partita imposed different policies and procedures on African-
17 American employees and conducted secret surveillance only on
18 African-American employees to procure a reason to terminate them.
19 Plaintiffs also aver that, although they were terminated because
20 their breaks purportedly violated Defendant's policies, these
21 breaks in fact did not. Finally, Plaintiffs plead that non-African
22 Americans took breaks similar to theirs, but were not
23 surreptitiously monitored. Read together and taken as true, these
24 allegations are sufficient to support an inference of
25 discriminatory motive.

26 Defendant complains that the allegations contained in
27 Plaintiffs' 2AC "are almost identical to the guidance the court
28

1 gave them in its prior ruling." Mot. 6. This does not, on its
2 own, offend any legal rule. However, these allegations are subject
3 to Plaintiffs' counsel's obligations under Federal Rule of Civil
4 Procedure 11(b). If these factual contentions were not made in
5 good faith and lack any evidentiary basis, sanctions may be
6 imposed, either pursuant to motion or the Court's own initiative,
7 under Rule 11(c).

8 Defendant also complains that Plaintiffs do not dispute its
9 claims that "they were taking extended amounts of leisure time
10 while on the clock." Id. 7. However, on a motion to dismiss,
11 Plaintiffs have no burden to rebut Defendant's unsupported
12 assertions. Further, Defendant has not submitted any evidence, nor
13 has it suggested that the Court should convert its motion to
14 dismiss into a motion for summary judgment. See Fed. R. Civ. P.
15 12(d).

16 Accordingly, Defendant's motion to dismiss Plaintiffs'
17 discrimination claim is denied.

18 II. Wrongful Discharge in Violation of Public Policy

19 Under California law, an employee may maintain a tort cause of
20 action against his or her employer when the employer's discharge of
21 the employee contravenes fundamental public policy. Foley v.
22 Interactive Data Corp., 47 Cal. 3d 654, 666 (1988). Such claims
23 are often referred to as Tameny claims, after the decision in
24 Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 176-177 (1980).
25 A claim for wrongful termination in violation of public policy must
26 be based on a fundamental policy established by a constitutional,
27 statutory or regulatory provision. Green v. Ralee Eng'g Co., 19

1 Cal. 4th 66, 76, 90 (1998).

2 Because Plaintiffs have sufficiently plead that they were
3 discharged on the basis of their race in violation of FEHA, they
4 state a viable Tameny claim. Accordingly, the Court denies
5 Defendant's motion to dismiss this claim.

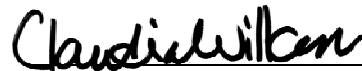
6 CONCLUSION

7 For the foregoing reasons, the Court DENIES Defendant's motion
8 to dismiss. (Docket No. 27.) Although Plaintiffs plead facts that
9 closely mirror the guidance the Court offered in its Order of
10 December 7, 2010, these allegations are subject to the obligations
11 set forth in Rule 11(b). Thus, if Plaintiffs' factual contentions
12 were not made in good faith and lack any evidentiary basis,
13 sanctions may be imposed. Fed. R. Civ. P. 11(c). Defendant shall
14 answer Plaintiffs' complaint within fourteen days of the date of
15 this Order. Fed. R. Civ. P. 12(a)(4)(A).

16 A case management conference will be held on February 15, 2011
17 at 2:00 p.m.

18 IT IS SO ORDERED.

19
20 Dated: 1/31/2011



CLAUDIA WILKEN
United States District Judge